



February 12, 2002

Mr. Marc Allen Connelly
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2002-0650

Dear Mr. Connelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158517.

The Texas Department of Health (the "department") received a request for information relating to a dialysis facility. You state that some of the requested information either has been or will be released. You claim that the rest of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We must first address the department's failure to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

You state that the department received this request for information on October 3, 2001. The department then had 10 business days, or until and including October 17, 2001, in which to ask for this decision. The department's request for this decision is dated December 3, 2001 and was received by this office via interagency mail on December 4, 2001. Thus, the department has failed to comply with section 552.301(b) in requesting this decision. *See also* Gov't Code § 552.308(b) (governmental body must demonstrate timeliness of request, notice, or other writing submitted by interagency mail). Therefore, the information at issue

is presumed to be public and must be released under section 552.302, unless there is a compelling reason why it should be withheld from disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. You claim that the information in question is confidential by law; therefore, we will address your arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential. Chapter 251 of the Health and Safety Code relates to end stage renal disease facilities. Section 251.015 provides as follows:

(a) A medical review board shall advise the [Texas Board of Health] on minimum standards and rules to be adopted under this chapter.

(b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f) and other appropriate information provided to or compiled by the [Texas Department of Health] with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the [Texas Department of Health] about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.

(c) Information concerning the quality of care provided to or compiled by the [Texas Department of Health] or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under Chapter 552, Government Code, and is not subject to discovery, subpoena, or other compulsory legal process.

(d) The [Texas Department of Health], in its discretion, may release to a facility information relating to that facility that is made confidential under Sub-section (c). Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides in part:

(g) A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under Chapter 552, Government Code, in accordance with that chapter or other applicable law.

Id. § 251.061(g). You state that the information in question relates to an end stage renal disease facility licensed by the department. You indicate that the submitted documents contain information concerning quality of care that was provided to or compiled by the department or a medical review board and a recommendation of the medical review board. You inform us that the state surveyor created the submitted State Forms upon inspection of the facility. You explain that the left column of the State Forms contains the deficiencies cited, much of which is quality of care information. You have marked information in the Complaint Intake Report and the State Forms that you claim is confidential under section 251.015(c). Based on your representations and our review of the submitted documents, we agree that the marked information in these documents is confidential under section 251.015(c) of the Health and Safety Code. Therefore, this information must be withheld from disclosure under section 552.101 of the Government Code.

You also state that the information in the right column of the State Forms consists of plan of correction information, as submitted by the facility, that may be released under section 251.061(g). Based on your representation and our review of the plan of correction information, we find that this information is not made confidential by law, pursuant to section 251.061(g). Furthermore, we do not find that any other compelling reason exists to withhold this information. Accordingly, the department must release the information in the right column of the State Forms under section 251.061(g).

You also raise section 552.101 of the Government Code in conjunction with the Medical Practice Act (the “MPA”), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). The MPA also includes provisions that govern the disclosure of information that it encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records

Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990).

You indicate that the highlighted information in the Intake Worksheet was provided to the department by the dialysis facility. We agree that this information is subject to the MPA. The department may release this information only if the MPA permits the department to do so.

We also note that the submitted documents include a federal Form HCFA-2567, Statement of Deficiencies and Plan of Correction. Federal regulations require the release of an HCFA-2567 form, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5-6 (1988).¹ You do not claim, nor does it appear to this office, that this HCFA-2567 form contains any information that is made confidential by law or that implicates third-party interests. Therefore, the department must release the federal HCFA-2567 form.

In summary, the marked information in the Complaint Intake Report and the State Forms is confidential under section 251.015(c) of the Health and Safety Code. The department must withhold this information under section 552.101 of the Government Code. The highlighted information in the Intake Worksheet is subject to the MPA. The department may release this information only if the MPA permits the department to do so. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

¹Section 401.133 of title 42 of the Code of Federal Regulations provides that "[t]he statement of deficiencies or report and any pertinent written statements furnished by the institution or facility on the statement of deficiencies shall be disclosed within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by [the federal Centers for Medicare and Medicaid Services]." 42 C.F.R. § 401.133(a)(2).

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

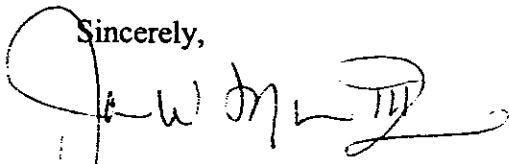
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J W Morris III', written over a faint circular stamp.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 158517

Enc: Submitted documents

c: Ms. Evangelina Garcia
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(w/o enclosures)